Adonai v Republic (Criminal Appeal E068 of 2021)
[2024] KEHC 4264 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4264 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E068 OF 2021

RN NYAKUNDI, J

APRIL 11, 2024

BETWEEN

FREDRICK ADONAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Representation:

Mr. Mugun for State.

1. The appeal before this court arises from the judgment and decree of Hon. Naomi Wairimu in Eldoret CMCCRC SO 255 of 2018 – *Republic vs Fredrick Adonai*. The appellant was charged with the offence of defilement contrary to section 8(10 as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 10th and 13th November 2018 in Wareng District within Uasin Gishu county intentionally and unlawfully caused his penis to penetrate the anus of IT a child aged 9 years old.

2. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars were that on 10th and 13th November 2018 in Wareng District within Uasin Gishu county intentionally and unlawfully touched the anus of IT a child aged 9 years old with his anus.

3. PW1 the, complainant stated that he was living with the accused and his mother when on the 10th to 13th November 2018, his mother had gone to work and left him with his father who did 'bad manners' to him after which he told him that he would spank him if he told anyone. The witness further stated that on 13th November 2018, his father sent his mother for milk and when she was away, then grabbed him and did 'bad manners' to him and when she returned, she found the house locked. The witness stated that he decided to tell his mother what had happened and the next morning, she mother took

him to the police station where they were referred to Moi Teaching and Referral Hospital where he was examined and given medication.

4. During cross examination, the witness stated that he had told the police what he told court.

5. PW2 the complainants mother produced his baptism card on which it indicates the complainant was born on the 2/1/2009. The witness stated that she had lived with the accused and her 2 sons for 3 years and further, that on 13th November 2018, the accused insisted that she goes to the shop and when she got back, she found door to their house locked from inside. When the boy opened the door, she noticed the boy was pulling up his trousers. The witness stated that she examined the complainant and noticed that there was some oil on his buttocks and that she was shocked to see her husband coming out of the bed while fastening his belt. The witness stated that the complainant told her that the accused had done bad manners to him and the next morning her landlord advised her to report to the village elder who referred him to go to the police station. The witness testified that she was taken to Moi Teaching and Referral where the child was examined and a P3 was filled and the Dr. told her the child had been defiled after which the accused was arrested.

6. Upon cross examination, the witness stated there were many people who were living in the plot but he did not raise alarm since people would have killed the accused.

7. PW3 a medical practitioner stated that she examined the complainant on the 14/11/2018 and observed that he had several fresh tears and lacerations on the annul opening, the anal sphincter was torn but functional. The witness stated that the injuries were 2 days old and were an indication there was penetration.

8. During cross examination, the witness stated that the child was walking when he went to hospital and that the child had been defiled on 2 occasions. The witness further stated that the child was not wearing the clothes he on when the incident occurred and that the injuries were caused by a blunt object which could be a penis, a pen or a stick.

9. PW4 the investigating officer confirmed that the incident was reported at Langas Police Station on 14/11/2018 by the complainant and his mother and she recorded their statements after which the complainants mother took him to the house where he found the accused and arrested him.

10. During cross examination, the witness stated that she informed the accused he was under arrest for defilement when he was arrested and denied that she had demanded Kshs. 200,000/- from the accused. The witness further stated that she had been a police officer for 20years and that the other officer she was with did not record a statement.

11. The court considered the prosecution case and found that the accused was put on his defence.

12. The accused, in his sworn defence stated that on the date of the incident he was called while in Meru and told his son had been admitted at Moi teaching and Referral Hospital. When he got there, he did not find the child at home. The witness stated that the next day his wife told him she wanted to go to her mothers and he gave her Kshs. 2,000/-. Later that day, his wife called him home where he found 8 men and 4 women. The witness stated that a vehicle from Langas Police Station appeared and he was taken to the station where his wife went the following morning and demanded for Kshs. 200,000/- so that she could withdraw the case. The witness further stated that he later recorded his statement as the officer wrote what he said but when he saw the statement, the contents were different from what he had said. The witness stated that the matter proceeded but he did not know or understand what was going on.

13. During cross examination the witness stated that PW2 ho is his wife admitted she had tricked him to go to the hospital but the child was fine when he got home from Meru. The trial court considered the evidence and the testimonies of the witnesses and found that it was convinced beyond any reasonable doubt that the prosecution proved beyond any reasonable doubt, that the complainant was defiled by the accused. The accused was sentenced to life imprisonment.

14. Being aggrieved by the conviction and sentence, the appellant instituted the present appeal vide a Petition of appeal dated 15th October 2021 premised on the following grounds;

    i. That the trial magistrate erred in law and facts by convicting (me) without proper evaluation of the fact that there existed a grudge between the appellant and the mother of the victim.

    ii. That (I) am aggrieved the trial court erred in law and fact as it failed to hold that the charge sheet was fatally defective.

    iii. That the trial court erred in law and facts as it failed to observe that the witness evidence was inconsistent and uncorroborated.

    iv. That (I) am aggrieved the trial court erred in law and facts as it failed to hold that the evidence of identification and recognition was not conclusive.

    v. That the learned trial magistrate erred in law and facts by shifting the burden of proof from the prosecution backyard to the appellant when the evidence failed to link him to the offence.

    vi. That other grounds will be raised during the hearing.

15. The parties were directed to prosecute the appeal vide written submissions.

Appellant's Case

16. The appellant filed submissions on 9th January 2024. He urged that the sentence of life imprisonment, was mandatory in nature. That the court did not use its discretion on sentencing and the court did not consider the provisions of sections 216 and 329 of the *Criminal Procedure Code* and *Sentencing Policy Guidelines* 2016 before sentencing. The failure by the trial court to consider the provisions of sections 216 and 329 was fatal to the prosecution case and this went to the root of the prosecution case. He stated that recent law developments have clearly shown that courts can divert from the mandatory minimum sentences enshrined in the *Sexual Offences Act*. He cited the case of *Philip Mueke Maingi & 5 Others v Director of Public Prosecutions & the Attorney General*, 29 Odunga J. in support of this submission. He also cited the case of *Julius Kitsao Manyeso vs Republic* – Criminal Appeal No. 12 of 2021 and urged the court to allow the appeal.

17. It is the appellants' submission that it is now settled law that before a conviction for the offence of defilement can be made, the prosecution has to prove beyond reasonable doubt that,

    a) There was penetration

    b) That the penetration was caused by the person accused

    c) That the age of the complainant was established.

18. Further, that these ingredients were recapitulated in the case of *Fappyton Mutuku Ngui -vs- Republic* (2012) eKLR by the learned Judge Joel M Ngugi (as he was then). He submitted that on proof beyond

reasonable doubt, the Court of Appeal in *Stephen Nguli Mulili v Republic* (2014) eKLR stated as follows;

> " It is not in doubt that the burden of proof was with the prosecution. The *locus classicus* on this is the case of *DPP v Woolmington* (1935) UKHLI. Where the court eloquently stated that, the 'golden thread 'in the web of English common law Is that it is the duty of the prosecution to prove its case. The Kenyan courts have upheld this position in numerous cases, - see *Festus Mukatimurwa v R* (2013) eKLR.

The appellant submitted that applying the above principles to this matter, the standard of proof beyond reasonable doubt was not met.

19. On the evidence of age of PW1, he urged that it stands to be in doubt. In evidence in chief PW1 stated that she was 10 years old. PW2, the complainant's mother, told the court that PW1 was 10years old. It was his case that she did not produce a birth certificate, a school leaving certificate or a clinical card to prove the age of her daughter. She produced a baptismal card from. Mt. Olives church.P.EX-1. PW2 stated the date her daughter was born was 2.1.2009.. .PW2 was not the author of this document and she did not inform court how she got it. PW3, the clinician, stated the age of the complainant was 9 years. In his evidence. However, the PRC and the P3 forms which he produced in court show that the victim PW1 was aged 9 years old. It is disturbing since the source of this information is not disclosed. PW3 as a clinician did not produce an age assessment report to prove the age of the star witness. Thus, it cannot be true that the age of the complainant was ascertained. This was an error in law.

20. The appellant submitted that it is true that the appellant was unrepresented thus the learned trial magistrate was bound in law to safeguard the appellant, failure to which prejudiced the appellant, thus the evidence of age was not proved to the required standard. In cases of defilement, age is very important aspect that requires to be proved for sentence to be meted out is pegged on the age of the victim. He cited the case of *Francis Omuroni versus Uganda*. Court of Appeal in Criminal Appeal No. 2 of 2000 and the case of *Kaingu Elias Kasomo vs Republic* in Malindi the Court of Appeal in Criminal Appeal No. 504 of 2010 and urged that these two judgements emphasize the importance of the proof of age in defilement offences.

21. The appellant submitted that Penetration is defined in section 2 of the *sexual offences Act* and further, that in sexual offences penetration can be proved by the evidence of the complainant and or supported by the evidence of medical examination. He stated that the *Children's Act, 2001* defines a child of tender years to mean a child under the age of ten years. The evidence on record shows that PW1 was not a child offender years since she was ten years. Therefore, her evidence needed corroboration with other material evidence. He urged that the learned trial magistrate did not warn himself on the danger of basing a conviction on evidence of a single witness who was a child aged 10 years and her evidence was not corroborated by any material evidence which went to the root of the prosecution case.

22. The appellant reiterated that the trial magistrate took it to mean that, the evidence of PW1 the complainant was corroborated by the evidence of PW3 the clinician. A close scrutiny of these evidence does not support corroboration. The evidence of PW3 was very precise. He stated that, the complainants' male genitals had no discharge. He had several fresh tears and aerations on the annual opening. Anal sphincter was tom but was functional he had no discharge according to him this was prove of penetration. He maintained that this was not conclusive evidence that PW3 was defiled. The court failed to observe that, no one witnessed the defilement. That, the complainant upon examination did not have bruises in his genitalia, there was no discharge noted. The state of urine was not stated. No presence of pus cells. He submitted that, if there were no bruises and there was no discharge noted, what was the basis of the conclusion of defilement? He urged that the p3 forms which was produced

by PW3 does not support his evidence in chief in court. Neither does it support a discharge noted. A doctor's medical opinion must flow from the examination findings. In this case the clinician's opinion is not supported by any findings of examination bud by the history given by PW1 the complainant. The medical examination did not establish that the complainant was defiled. He cited the case of *Arthur Mshila Manga v Republic* (2016) eKLR and urged the court allow the appeal.

23. The appellant submitted that the plea was taken on the 19th day of September 2018 and a hearing date taken. That was on 25th October 2011. The proceedings went on without providing the appellant with the prosecution witness statements until when the case closed on 11/8/2021 which prejudiced the appellant. Further, that the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. It was his testimony that this was an error and he cited article 50 of *the Constitution*. He stated that without fair hearing, there cannot be fair determination of any case by a court of law. He cited the case of Ann Njogu & 5 Others vs Republic Misc. Appl. No 551 of 2007 in support of this submission. He also cited the case of *Thomas Patrick Gilbert Cholmondeley vs Republic* (2008) eKLR in support of this submission.

24. The appellant submitted that it is trite that fair trial is the object of criminal procedure. The court is thus under an obligation to ensure that the prerequisites of provision of witness statements and copies of exhibits are provided to the accused before the start of the case, and that failure to do so prejudices the accused, whatever the outcome may be.

25. It is the appellant's case that his right under article 50[2] [g] of *the constitution* was not considered. He was not informed of his right to choose and be represented by an advocate. This was prejudicial to the appellant who was unrepresented and who did not understand the complicated process of the court. He cited the case of *Chacha Mwita v Republic* [2020] eKLR in support of this submission. He urged the court to allow the appeal.

Respondent's Case

26. The submissions on behalf of the republic was filed by Senior Prosecution Counsel David Fedha. He urged that PW-1 testified that the appellant sodomized him repeatedly. The victim to this crime testified that the appellant was his step-father and defiled him repeatedly. PW-1 also testified that PW-2 peeped through the window and witnessed what happened. PW-2 corroborates the testimony of PW1. She stated that the accused was her husband and he had sent her to the shops little did she know that the appellant had planned to sodomize PW-1, She further stated that when she went back to the house, she was shocked to see her son coming out of their matrimonial bedroom while pulling up his trousers. Additionally, she testified that upon examining the son, she noticed that he had been defiled by the husband.

27. PW-2 confirmed the age of the victim to be nine years when the offence was committed. PW-3, the doctor, stated that she examined the victim and concluded that he had been sexually violated, she stated that the anal sphincter was torn.at page 39 of the record she concluded that the victim had tears and abrasions in the annul opening that are consistent with penetration, she prepared and signed a report dated 15th November 2018. The trial court in its wisdom noted that the victim was a child of tender age and that the appellant took advantage of the victim's age to lure him to the bedroom and subsequently defiling him.

28. Counsel urged that in the instant case, the victim of the crime was the step son to the appellant but he grossly violated his modesty . He submitted that this court must send a clear message to the Convict and the society that exposing young vulnerable children shall not be tolerated.

29. It was the prosecution's case that at the sentencing stage of a criminal case, the onus is on the State to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating. He cited the case of The State -vs- Muller, Ivan, Andriess and the case of the *State —vs- Mpho Mpelegang6* on the factors that the court should consider when sentencing.

30. The respondent urged the court to dismiss the appeal as it is clear from the proceedings that the appellant was the only person that had the power and control of the minor herein at the time the offence was committed. He cited section the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court, shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth. He stated that all witnesses corroborated each other and were consistent.

31. He submitted that the charge sheet was not defective as alleged by the appellant, any defect or error can be cured by the provisions of section 382 of the *Criminal Procedure Code*. Further, that the conviction and the sentence was safe taking into account the circumstances, aggravating factors and that the prosecution proved it case beyond reasonable doubt. He urged the court to dismiss the appeal.

Analysis & Determination

32. This being a first appeal, it is imperative to state the duty of the appellate court as set out in *Kiilu & Another vs. Republic* [2005] 1KLR 174 where the Court of Appeal stated that:

> "
>
> "1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> 2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."
>
> See also *Okeno vs. Republic* [1972] EA 32 on the same subject.

33. Upon considering the record of appeal, the judgement of the trial court and the submissions tendered, the following issues arise for determination;

    i. Whether the prosecution proved its case to the required standard

    ii. Whether the sentence was harsh or excessive

Whether the prosecution proved its case to the required standard

34. Section 8(1) as read with section 8(3) of the *Sexual Offences Act* provides as follows;

> 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

35. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) of the *sexual Offences Act* No. 3 of 2006 and must each be proven for a conviction to issue. (see *George Opondo Olunga vs. Republic* [2016] eKLR)

Whether the Age of the Victim Was Proved

36. The complainants' mother produced a baptism card as proof of his age. The card stated that the complainant was born on 2nd January 2019. It is not in dispute that the victim was a child of tender years as even in appearance, it is possible to tell that the victim is a child. It is my considered view that the baptism card was sufficient evidence as to the age of the victim.

Identification

37. The accused person was found by the victim's mother after committing the act and further, the minor identified him upon the court conducting a voire dire. The court established that the complainant was being truthful upon conducting said voire dire. Therefore, it is my considered view that the court was correct to rely on the evidence of the complainant and the evidence of his mother to corroborate the identification.

Penetration

38. Dr. Taban Lilian Tokosan testified in court with regards to the medical examination she conducted on the complainant. She confirmed that she is the one who examined him and filled the P3 form. From her examination she confirmed that the injuries were consistent with defilement and as such, that the victim had been defiled. This corroborated the evidence of the complainant that he had been defiled and the evidence of his mother as to her observations. It follows that penetration was proved to the required standard.

39. In the premises, I find no reason to interfere with the finding of the court that the appellant was guilty of the offence of defilement.

Whether the Sentence Was Harsh or Excessive

40. The prescribed sentence for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* is life imprisonment. However, the emerging jurisprudence is that life sentence was declared unconstitutional in the case of . In Malindi Criminal Appeal no. 12 of 2021 – *Julius Kitsao Manyeso v Republic* the three-judge bench of the Court of Appeal made the following finding;

> We note that the decisions of this Court relied on by the Appellant, namely *Evans Wanjala Wanyonyi vs Rep* [2019] eKLR and *Jared Koita Injiri vs Republic* Kisumu Crim. App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision

in *Francis Karioko Muruatetu & another v Republic* [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the *Penal Code*. This fact notwithstanding, we are of the view that the reasoning in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others vs The United Kingdom* (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

...

We are equally guided by this holding by the Supreme Court of Kenya, and in the instant appeal, we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence.

41. In light of the sentence of life imprisonment being declared unconstitutional, the appeal only succeeds to this extent. In the premises, I set aside the sentence of life imprisonment and substitute it with a sentence of 30 years imprisonment to run from 19th November 2018 in consonant with Section 333(2) of the *CPC*.

It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11TH DAY OF APRIL 2024

.....

R. NYAKUNDI

JUDGE

Mr. Mugun for State